Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*

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Constitutional issues arising from the ruling in the *Pupino* case – Court of Justice holds that the duty of consistent interpretation applies also in relation to framework decisions – Analysis of the extent to which the doctrine of consistent interpretation can (and should) be transposed to the area of police and judicial cooperation in criminal matters – Consequences for possible extension of other constitutional doctrines elaborated in the context of the first pillar to the third pillar – Extent to which third pillar acts can become a vehicle for the enforceability of fundamental rights as general principles of Union law – The possibility of invoking *Francovich* damages for breaches of Union law – To what extent can the *Pupino* reasoning be extended to the second pillar?

In June 2005, the European Court of Justice held that national courts have a duty to interpret national law insofar as possible in conformity with framework decisions. In order to reach its conclusions, the Court extended first pillar doctrines to the ambit of the third pillar. Whilst one can well agree with both the reasoning and the result reached by the Court, this cross-pillarisation opens up a new range of constitutional questions, from the true relationship between third (and second) pillar instruments with national law, to issues of fundamental rights protection, democratic accountability, judicial protection and so on. If those questions echo familiar debates that have already taken place in the context of the first pillar, the very subject-matter of law-making in the third pillar renders the debate much more complex: our perception of the legitimacy of criminal law is inherently influenced by a 'national' mode of thinking, whereby the State's power to impose and execute criminal sanctions is seen both as being at the very core of sovereignty, and to be the area where democratic and judicial scrutiny is most needed. Both

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these assumptions must be reconsidered when we devise the possibility to take action in this area at Union level; and when such action is capable of producing independent legal effects in the national context.

In this contribution, I will examine these issues. In particular, after having recalled the peculiarities of the third pillar institutional structure, I will focus on the effect of the *Pupino* ruling and in particular on its scope; on the extent to which other Community law doctrines (and in particular fundamental rights and *Francovich* damages) are applicable in relation to third pillar matters; and on the extent to which the reasoning in *Pupino* can be extended to second pillar legislation.

The third pillar institutional framework

Title VI of the European Union Treaty, commonly referred to as third pillar, confers upon the Union powers in the field of police and judicial co-operation in criminal matters.[1] There are four types of legal instruments that can be adopted within Title VI: common positions, framework decisions, decisions, and conventions. Furthermore, the Union can also enter into international agreements in the fields covered by Title VI using the passerelle clause provided in Article 38 EU, which allows the Union to use Common Foreign and Security Policy competence (Article 24 EU) to enter into international agreements. Common positions are, or should be,[2] essentially political instruments: they define the 'approach of the Union to a particular matter'. Thus, and perhaps not surprisingly, the European Parliament's participation is not provided for in relation to those instruments, and the Court's jurisdiction is excluded altogether.[3] Conventions are akin to international agreements: thus, the Council merely recommends the adoption of such conventions to the member states, and such adoption is in accordance with national constitutional requirements. Conventions enter into force when at least half of the member states have adopted them, and their effect is limited to those latter member states.[4]

[1] *See* generally P.J. Kuijper, 'The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects', 41 *CMLRev.* (2004) p. 609; S. Peers, *EU Justice and Home Affairs Law* (London, Longman 2000); N. Walker (ed.), *Europe's Area of Freedom, Security and Justice* (Oxford, Oxford University Press 2004).

[2] *See* E. Spaventa, 'Fundamental what? The difficult relationship between foreign policy and fundamental rights', in M. Cremona and B. de Witte (eds.), *EU Foreign Relations law: Constitutional Fundamentals* (Oxford, Hart Publishing, forthcoming 2007).

[3] Art. 39(1) EU; according to the second paragraph of that article, the Presidency and the Commission must regularly inform Parliament of discussions in areas covered by Title VI.

[4] Art. 34(2)(d).

Framework decisions are akin to directives with the difference that Article 34 EU specifies that they do not entail direct effect. Thus, they are binding upon the member state as to the result to be achieved, but leave discretion as to the choice of forms and method. Framework decisions can be used to provide for approximation of rules in criminal matters. In relation to rules relating to the 'constituent elements of criminal acts and penalties' in the fields of terrorism, organised crime and drug trafficking such approximation concerns only 'minimum rules'.[5]

Decisions seem, at first sight, similar to the homonymous Community law instrument but for the lack of direct effect. Thus, they are binding but cannot be used for approximation purposes.[6] However, and regardless of the confusing terminology, decisions seem to be radically different from the equivalent instrument in Community law: thus, whilst Article 249 EC expressly provides for an 'addressee' to a decision, who is the person or entity that is bound by it, the same is not true for decisions adopted within Title VI. This difference can be explained with regard to the lack of direct effect in relation to third pillar instruments: however, it also suggests that decisions can have a more general (legislative) scope than their sister acts in Community law.

Democratic accountability is limited in relation to both types of instruments. The European Parliament has only a consultative role, which therefore excludes a power of veto, and national parliaments can influence the substance of such acts only in the pre-adoption stage through control of their representative in Council. After a framework decision or a decision has been adopted, it is binding on the member state without need for ratification by national parliaments. And, as we shall see in more detail later, even though both instruments by nature need to be implemented at the national level, they can produce legal effects even without such implementation having taken place.

The jurisdiction of the European Court of Justice

The jurisdiction of the European Court of Justice is limited in relation to third pillar measures. Direct challenges to the validity of third pillar instruments are provided only for framework decisions and decisions, and standing is limited to member states and Commission, thus excluding not only individual applicants but also the European Parliament. Member states can also bring actions in relation to disputes as to the interpretation of any third pillar instrument (although the chances of them doing so might in fact be rather remote)[7] and the Commis-

[5] Arts. 29, last indent, and 31(1)(e) EU.

[6] Art. 34(c) EU.

[7] Even in the first pillar, litigation between member states is a rare occurrence. Given the sensitivity of the subject-matter covered by the third pillar, it is an even more unlikely event here.

sion is entitled to bring actions in relation to the interpretation or application of conventions. However, the Commission cannot bring actions for infringement of Title VI EU, including a failure to implement it correctly.

The Treaty provides also for the possibility of preliminary rulings in relation to framework decisions, decisions and conventions. However, such a possibility is conditional upon the member state having made a declaration accepting the jurisdiction of the Court (so far only 14 out of 25 member states have made such a declaration);[8] and the declaring member state can limit the possibility of making a preliminary ruling to courts against whose decisions there is no remedy.[9] Even when the member state has made a declaration accepting the jurisdiction of the Court, Article 35 EU, unlike Article 234 EU, does not make the preliminary reference mandatory for courts against which there is no judicial remedy.[10] In any event, the Court cannot review the validity or the proportionality of operative decisions, i.e. of operations carried out by the police or other law enforcement bodies in relation to maintenance of law and order and the safeguarding of internal security.

The character of the third pillar is therefore complex: the strong inter-governmental component arising from the Council's legislative monopoly; the exclusion of any possibility for individuals and Parliament to challenge the validity of Union acts in direct actions; and the exclusion of direct effect, is somehow tamed by some supranational elements, such as the (limited) jurisdiction of the European Court of Justice and the immediately binding nature of framework decisions and decisions. This hybrid nature of the third pillar then raises difficult questions as to the constitutional effects of legal instruments adopted in the field of co-operation in criminal matters. In particular, to what extent does the supranational component of the third pillar justify the extension of the constitutional tools elaborated in the context of the first pillar? The European Court of Justice recently addressed this question in the *Pupino* ruling,[11] the first, and so far only, occasion where the Court has had a chance to explain the legal effect of framework decisions.

[8] At the time of writing, and to the best of the author's knowledge, all of the EU 15, except Denmark, Ireland and the United Kingdom, have made a declaration pursuant to Art. 35 EU. Of the EU 10, only the Czech Republic and Hungary have made such a declaration.

[9] Art. 35 EU; Spain and Hungary have restricted the possibility to make preliminary references to its courts of last instance, whilst the other member states have allowed all of their courts to make preliminary references.

[10] Belgium, Spain, Italy, Luxembourg, the Netherlands, Austria, the Czech Republic, Germany, Greece, France, Portugal, Finland and Sweden have reserved the right to make it compulsory for the courts of last instance to refer the matter to the ECJ; *see* Council information concerning the declarations by the French Republic and the Republic of Hungary on their acceptance of the jurisdiction of the Court of Justice to give preliminary rulings on the acts referred to in Art. 35 of the Treaty on European Union, *OJ* [2005] L 327/29.

[11] ECJ 16 June 2005, Case C-105/03, *Maria Pupino*.

The Pupino ruling

The *Pupino* ruling arose out of a reference by an Italian court enquiring as to the interpretation of the framework decision on the standing of victims of crime.[12] The case concerned criminal proceedings against a nursery teacher accused of maltreating her pupils. The prosecutor requested the competent judge to allow for evidence to be taken early on the ground that such evidence could not be deferred until trial because of the witnesses' extreme youth. The public prosecutor also requested that such evidence be gathered under a special procedure, which allows for evidence to be taken in specially designed facilities, so as to protect the dignity, privacy and tranquillity of minors and possibly to involve a child psychologist. However, according to Italian law, the special rules of procedure invoked by the prosecution were available only in instances of abuse of a sexual nature. The national court thus referred the case to the Italian Constitutional Court, enquiring as to the compatibility of the limited availability of the special rules of procedure to crimes of a sexual nature with the right to equality and the principle of dignity enshrined in Articles 3 and 2 of the Italian Constitution. The Constitutional Court found that such a limitation was compatible with the Constitution since the principle of equality was not breached by the regime, and, thus, the principle of dignity could not be used to extend a special procedure, which derogated from the ordinary procedure to be followed in taking evidence, to crimes not identified by the legislature.[13] Relying on the existence of the framework decision, the national court then referred the case to the Court of Justice. The national court considered that it was bound by a Union law duty to interpret Italian law in conformity with the framework decision on the standing of victims of crime, which requires that victims should be treated with respect for their dignity and that vulnerable victims are adequately protected. It therefore requested a

[12] Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, *OJ* [2001] L 82/1. On *Pupino, see* M. Fletcher, 'Extending "indirect effect" to the third pillar: the significance of Pupino?', 30 *European Law Review* (2005) p. 862; J. Spencer, 'Child witnesses and the European Union', 64 *Cambridge Law Journal* (2005) p. 569; R. Calvano 'Il caso *Pupino*: ovvero dell'alterazione per via giudiziaria dei rapporti fra diritto interno (precessuale penale), diritto UE e diritto comunitario' [The *Pupino* ruling: or on the judicial alteration of the relationship between domestic (criminal procedural) law, EU law and Community law], to be published in *Giurisprudenza Costituzionale*, available on <www.associazionedeicostituzionalisti.it/materiali/anticipazioni/caso_pupino>. And more generally, M. Ross, 'Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality?', 31 *European Law Review* (2006) p. 476; K. Lenaerts and T. Corthaut, 'Of birds and hedges: the role of primacy in invoking norms of EU law', 31 *European Law Review* (2006) p. 287.

[13] Corte Costituzionale, Sentenza 529, 18 Dec. 2002, available on <www.infoleges.it>. The Constitutional Court also debated whether the court's interpretation of the rules of procedure at stake was actually correct, or whether a more generous interpretation was possible.

preliminary ruling as to the interpretation of some of the provisions of the framework decision.

Before addressing the national court's queries, the Court of Justice was faced with a series of preliminary objections raised by the intervening governments. In particular, it was a matter of contention whether the duty of consistent interpretation, according to which national courts have a duty to interpret national legislation insofar as possible so as to be consistent with Community law (especially when the Community law provision is not in itself directly effective),[14] applied also in relation to framework decisions. The intervening governments relied on the inter-governmental character of the third pillar in order to draw a distinction between framework decisions and directives and to exclude the possibility of extending a first pillar doctrine to Title VI EU. Furthermore, they also relied on the absence in the EU of a provision comparable to the duty of loyal co-operation enshrined in Article 10 EC. Since the duty of consistent interpretation has been based on the latter provision, which binds the national courts as well as the other organs of the member states, and since such duty is not expressly referred to in the EU, then, the governments argued, the national courts should be under no obligation to interpret national law consistently with framework decisions.

The Court did not accept the reasoning of the intervening governments. Rather, it drew on a number of considerations, literal, constitutional and teleological, to find that the duty of consistent interpretation extended also to framework decisions. Thus, it considered:

(i) The binding nature of framework decisions, which is formulated in identical terms to that of directives;[15] and the fact that 'it is perfectly comprehensible' that the Treaty drafters should have considered it useful to make provision for legal instruments with effects similar to those provided for in the European Community Treaty.

(ii) The Court's jurisdiction which, even if limited, would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain conforming interpretation in front of national courts.

[14] Consistent case-law starting with ECJ 10 April 1984, Case 14/83, *Von Colson and Kamann*. The UK Government also raised the issue as to whether the principle of supremacy applies to the third pillar; it conceded however that the duty of consistent interpretation might arise as a matter of international law. We are not going to deal with the principle of supremacy since that would require a lengthy investigation as to what that principle truly entails. The present writer is of the opinion that supremacy applies since the principle of consistent interpretation is a manifestation of that principle. However, the latter view is by no means uncontroversial. In this respect, *see* Dougan, 'When Worlds Collide. Competing Visions of the Relationship between Direct Effect and Supremacy', to be published soon.

[15] Cf. Art. 249(3) EC.

(iii) The fact that it would be difficult for the Union to carry out its objectives if the member states were not bound by the principle of loyal co-operation.

Having found that the duty of consistent interpretation applied also in the context of framework decisions, the Court specified, re-iterating what it had already held in the context of Community law, that the principle of consistent interpretation is limited by the general principles of Community law, and in particular by the principles of legal certainty, non-retroactivity and by fundaments rights as general principles of Union law. For those reasons, consistent interpretation can never be used to establish or aggravate the criminal liability.[16] Furthermore, the Court also specified that the duty of consistent interpretation does not stretch to (nor can serve the purpose of) an interpretation *contra legem* and that, consistently with what it held in *Pfeiffer,* in the context of Community law,[17] the national court must consider the whole of national law to assess whether it is possible to provide an interpretation which is not inconsistent with the framework decision.

The main constitutional question arising from the ruling in *Pupino* relates to the extent to which principles elaborated in the context of Community law[18] can be extended to the third and second pillar. In this respect, the Court's ruling might be more far-reaching than it appears at first sight. In particular, we shall consider the extent of the applicability of the principle of duty of consistent interpretation; whether such duty might be a vehicle through which general principles of Community law might become directly enforceable in the field of Union law; the possibility that the duty of loyal co-operation also might entail a right to *Francovich* damages for serious breaches of Union law; and the possibility that the principle of loyal co-operation applies also to instruments over which the Court has no jurisdiction.

The extent of the duty of consistent interpretation

The duty of consistent interpretation imposed on national courts in relation to framework decisions, which is most likely to apply as well in relation to decisions, is to be interpreted in a similar way to the same duty in relation to Community law. In particular, and as said before, the Court has indicated that national courts

[16] Cf. ECJ 8 Oct. 1987, Case C-80/86, *Kolpinghuis Nijmegen*; ECJ 26 Sept. 1996, Case C-168/95 *Criminal proceedings against Arcaro*. *See also* ECJ 3 May 2005, Case C-387/02, *Berlusconi and others*.

[17] ECJ 5 Oct. 2004, Case C-397/01, *Pfeiffer and others*.

[18] Exception given for the principle of direct effect for framework decisions and decisions which has said above is explicitly excluded by Art. 34 EU.

should, in order to comply with such a principle, have regard for the whole of national law. However, the duty of consistent interpretation is inherently limited by the general principles of Union law, and it can never be used to aggravate or create criminal liability.

The criminal liability proviso constitutes a basic safeguard for individuals: it reflects both the general principle *nullum crimen sine lege*; the principle according to which directives (and framework decisions) are addressed to member states and are therefore not capable of imposing obligations on individuals; and the principle according to which member states cannot rely on their own failure to implement Community law against individuals. In the Community law context, the application of the criminal liability exception has not proven to be particularly difficult nor particularly controversial. However, the transposition of the same doctrine in the field of co-operation in criminal matters might be more difficult, since the consistent interpretation in this field is more likely to centre on the interpretation of criminal law. In this respect, the ruling in *Pupino* is an example of the difficulties encountered in establishing a clear dividing line between what aggravates criminal liability and what does not.

To illustrate this point, it is useful to recall the Court's ruling in *Berlusconi*.[19] In that case, the national court referred a series of questions concerning the compatibility of legislative amendments introduced by the Berlusconi government with some of the company directives.[20] Amongst other changes, the new regime reduced the statute of limitation for offences of which the claimants in the main proceedings had been charged. The alleged offences had taken place before the new regime had entered into force. However, as a result of changes in the legislation, the proceedings had become statutorily barred. The Court reiterated its case-law according to which a directive cannot have the effect of aggravating criminal liability. Since the Italian criminal code expressly provides that the most lenient penalty always applies in case of a change of legislation, the Italian court could not rely on the directives. As said above, part of the national court's enquiry related to the statute of limitation, which is a rule of procedure. Whilst it is true that the case was decided focusing on the most lenient penalty rule, a rule which might be deemed substantive rather than procedural, the judgment also seems to suggest that rules relating to the statute of limitation may not be affected by Community law. On the other hand, in *Pupino*, the Court accepted, in principle, that the duty of consistent interpretation could be used to affect rules on how evidence should

[19] ECJ 3 May 2005, Case C-387/02, *Berlusconi and others*. On this point *see also* Calvano, *supra* n. 12.

[20] First Companies Directive 68/151, *OJ* [1968] L 65/8; Fourth Companies Directive 78/660, *OJ* [1978] L 222/11; Seventh Companies Directive 83/349, *OJ* [1983] L 193/1.

be gathered in order for it to be legally relevant in the proceedings.[21] However, rules on evidence are not in kind different from rules determining the time limit for an action: both are procedural rules which in themselves neither create nor aggravate criminal liability, and yet both might well determine the outcome of the case.[22] It is likely that the public prosecutor's worries lay as much with the fact that evidence gathered at a later stage might not be sufficient to convict Mrs. Pupino, as with the welfare of the young victims. In that sense, whilst it is true that rules concerning how evidence is gathered are not constitutive of criminal liability, and cannot aggravate it, they might well determine the outcome of the case, just as the rules concerning the time bar determined the *Berlusconi* case. Whilst the Court's different approach in *Pupino* and *Berlusconi* might well be explained having regard to the particular facts of the cases, a comparison between the two is useful to draw attention to the difficulties arising in determining which rules aggravate liability and which rules do not have such an effect and can therefore be subject to the duty of consistent interpretation. It is true that the Court of Justice clarified that in any event the duty of consistent interpretation is subject to fundamental rights, including the need to ensure that the application of Union law would be consistent with Article 6 of the Convention (as interpreted by the European Court of Human Rights). However, one could question whether application of the duty of consistent interpretation to rules of criminal procedure, which might result in a detrimental effect on the person charged of a criminal offence, would ever be compatible with the guarantees afforded by the European Convention on Human Rights, and with the principle of legal certainty and forseeability that apply, at least to a certain extent, also to rules of procedure.[23] In this respect, it would have been preferable for the Court to clearly state that the principle of consistent interpretation can never be used to the detriment of the defendant, regardless of the nature of the rules in question (in which case the *Pupino* ruling would have been of little use to the prosecution).

Furthermore, it should be noted that in relation to directives, the duty of consistent interpretation arises regardless of whether the national rule at issue has been adopted in order to implement a given provision of Community law; and

[21] At para. 46 of the ruling the Court held that the rules at issue did not concern the 'criminal liability of the person concerned but the conduct of the proceedings and the means to take evidence'.

[22] *See also* Corte di Cassazione 15 May 2006, sentenza no. 1654, summary reported in *Reflets* (2/2006), p. 21, also available on <curia.europa.eu/fr/coopju/apercu_reflets/lang/index.htm>; and Calvano, *supra* n. 12.

[23] Cf., e.g., ECtHR, *Coëme, and Others* v. *Belgium* (Appl. Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96), Judgment of 22/06/2000, especially paras. 142 et seq. on the applicability of Art. 7 ECHR to rules concerning limitation periods.

indeed such a duty arises even when the national legislation at issue predates the Community law provision in question.[24] The national courts have to ensure the full effectiveness of Community law insofar as that is possible through interpretation, notwithstanding the two exceptions concerning *contra legem* interpretation and aggravation of criminal liability. If the duty of consistent interpretation is to apply in a similar way in relation to framework decisions, this means that even when a national parliament has failed, or refused, to implement a framework decision, such a decision can nonetheless produce legal effects in the domestic system. In relation to framework decisions, this might be seen as more problematic than it is in relation to first pillar instruments, since in the case of the former national parliaments so far have refused to give up their veto power. However, if the duty of consistent interpretation can be of use even lacking any implementation of the framework decision, the national legislature's monopoly in the field of criminal law is significantly eroded, as are accountability and democratic scrutiny. This would be all the more serious should the duty of consistent interpretation be used to the detriment of the defendant, even if not to aggravate liability.

Finally, the duty of consistent interpretation also should be seen as binding the courts in those member states which have refused to recognise the jurisdiction of the Court. The application of Article 1 EU and of the general principles of Union law cannot be made conditional upon a unilateral and voluntary act of the member state. Rather, and as it is clear from the Court's reasoning, the duty of loyal cooperation, with the ensuing duty of consistent interpretation, is a Union law constitutional principle and, as such, is binding upon all of the member states. This fact, however, places national courts in those member states which have not made the declaration pursuant to Article 35 EU in an uncomfortable position: they have to give some effect to Union law, but they are unable to enquire of the Court of Justice as to the true interpretation (and indeed the validity) of framework decisions.

This said, the writer believes the Court's approach to be consistent with the principles informing the European Union, which, even in its more intergovernmental manifestation, is still radically different from a traditional international organisation. And the duty of consistent interpretation is but an enhanced manifestation of the principle *pacta sunt servanda*, which through the medium of an independent constitutional system is binding upon the national courts as a matter of Union constitutional law, rather than national constitutional law.

It is now time to consider the extent to which other constitutional principles of the Community can be transposed to the third pillar.

[24] ECJ 13 Nov. 1990, Case C-106/89, *Marleasing* v. *Comercial Internacional de Alimentación*.

The scope of application of fundamental rights as general principles of Union law

I have argued elsewhere that the effects of *Pupino* are much more pervasive than they seem at first sight.[25] In particular, it should be questioned whether the applicability of the principle of consistent interpretation could be relied upon to invoke fundamental rights as general principles of Union law, not only as mere limits to consistent interpretation, but as directly enforceable rights against the State.

As it is well-known, in the Community law context, the Court has imposed pervasive fundamental rights obligations upon the member states. In particular, the member states have a duty to respect fundamental rights whenever they implement or act within the scope of Community law. This obligation has been codified by Article 51 of the Charter of Fundamental Rights,[26] which, even before the de-pillarisation effectuated by the Constitutional Treaty, provided that its provisions were binding upon the member states whenever they implemented *Union* law. The question is then whether, even independently from the Charter and from the Constitutional Treaty, fundamental rights as general principles of Union law are enforceable against member states. We shall recall first the scope of the fundamental rights review in the Community context, and then consider its scope in relation to Union law.

In relation to the first pillar, the Court has made it clear that when the member states implement Community law, their discretion is constrained by the general principles of Community law, including fundamental rights.[27] The case-law is not crystal clear, however, as to the extent of such an obligation. If the Community law provision is directly effective, then a national rule which falls within the scope of the Community rule and which breaches fundamental rights must be set aside. For instance, in the case of *Carpenter*,[28] the Court found that a rule which (allegedly) affected the claimant's directly effective right to move could not be

[25] E. Spaventa, 'Remembrance of Principles Lost: on Fundamental Rights, the Third Pillar and the Scope of Union law', 25 *Yearbook of European Law 2006* (Oxford, Oxford University Press, forthcoming 2007).

[26] And Art. II-111, Constitutional Treaty (*OJ* [2004], C 310/1). The Charter is not 'legally binding' but it is clearly legally relevant; it has now been referred to by the Court, ECJ 27 June 2006, Case C-540/03, *European Parliament* v. *Council*, para. 38.

[27] ECJ 13 July 1989, Case C-5/88, *Hubert Wachauf* v. *Bundesamt für Ernährung und Forstwirtschaft*. The national legislature's discretion also is constrained as a matter of national law by national constitutional rights; and, as a matter of international law, by the European Convention on Human Rights.

[28] ECJ 11 July 2002, Case C-60/00, *Mary Carpenter* v. *Secretary of State for the Home Department*. This is consistent case-law, e.g., *see* ECJ 18 June 1991, Case C-260/89, *ERT* v. *DEP*.

applied to the facts of the main proceedings, since it was incompatible with the claimant's right to family life. In such cases, however, fundamental rights act as a constraint to the discretion of the member states to limit a directly effective right. What is applied, and what displaces national law, is the directly effective right rather than the general principle.

In relation to non-directly effective provisions, the matter is less clear.[29] However, a recent ruling seems to confirm that general principles can be directly effective even when the provision that brought the matter within the scope of Community law is not in itself directly effective. In the case of *Mangold*,[30] litigation arose between two individuals as to whether Community law prohibited discrimination on grounds of age. As is well-known, the framework discrimination directive lays down a 'framework' to combat such discrimination;[31] however, that directive was not relevant since the time limit for its implementation had not expired. Therefore, according to the case-law, the principle of consistent interpretation was not applicable. This not withstanding, the Court found that the prohibition of discrimination on grounds of age was a general principle of Community law and that, since the legislation at issue fell within the scope of Community law by virtue of another directive,[32] such a general principle applied and was directly effective even in a case concerning a horizontal situation, i.e., in a case where the directive at issue could not have been directly effective.

The extent to which the *Mangold* case is a good authority is open to debate, and one could hope that the Court will retreat from giving horizontal effects to the general principles. However, the case is a further indication that general principles, including fundamental rights, can be at least *vertically* directly effective and therefore can be used to set aside national legislation, even when the rule which has brought the situation within the scope of Community law is not itself directly

[29] The confusion arises from the *Wachauf* formula, which seemed to indicate that in cases of implementation, the national court's duty was limited to a duty of consistent interpretation; however, later cases suggested that the fundamental rights obligation could be directly effective also in relation to implementation of non-directly effective Community law; *see*, e.g., ECJ 17 Dec. 1998, Case C-2/97, *Societá Italiana Petroli Spa (IP)* v. *Borsana Srl*; ECJ 12 Dec. 2002, Case C-442/00, *Ángel Rodríguez Caballero* v. *Fondo de Garancía Salaríal (Fogasa)*; ECJ 10 July 2003, Joined Cases C-20/00 and C-64/00, *Booker Aquaculture ltd and Hydro Seafood GSP Ltd* v. *The Scottish Ministers*.

[30] ECJ 22 Nov. 2005, Case C-144/04, *Mangold*. The case has not been welcomed by the scholarship because it introduces an element of legal uncertainty both in the identification of the general principles, and for the effect it has on private parties; *see*, e.g., February 2006 editorials in the *Common Market Law Review* and *European Law Review*.

[31] Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, *OJ* [2000] L 303/13.

[32] Council Directive 1999/70/EC concerning the framework agreement on fixed term-work concluded by ETUC, UNICE and CEEP, *OJ* [1999] L 175/43.

effective.[33] After all, if the member state is exercising discretion *within* the scope of Community law, it is only right that it should be bound by the Community constitutional system.

Following the ruling in *Pupino*, this reasoning could be extended to framework decisions (and decisions). Thus, whenever a field has been occupied by a framework decision, then the matter automatically falls within the scope of Union law, regardless of whether the member state has taken positive steps to implement the Union instrument. If it were otherwise, if national law was not falling within the scope of Union law, then clearly there would be no obligation arising in Union law for national courts to interpret their national legislation in conformity with the framework decision. Now, if matters covered by framework decisions fall within the scope of Union law, then fundamental rights as a general principle of Union law must be relevant, not only as a limit to the national courts' interpretative power, but also as a yardstick against which to measure the member state's actions. In other words, once a framework decision has been adopted, as a matter of Union law, the member state loses the discretion to regulate in a manner incompatible with the general principles, in the same way as national courts lose the discretion of interpreting national law or the framework decision in a manner that is incompatible with fundamental rights.

The open question is whether such fundamental rights obligation should be enforceable against the State despite the fact that the Treaty expressly excludes direct effect in relation to framework decisions. In the writer's opinion, there is no reason why that should not be the case. First, to argue otherwise would introduce a constitutional fracture in the system, which would be difficult to explain and at odds with the unitary structure of the Union, as well as with the general fundamental rights obligation contained in Article 6 of the TEU. In the context of Community law, the direct effect of the provision which brought the matter within the scope of Community law seems to be immaterial to the enforceability of the general principles of Community law, including fundamental rights. It would be peculiar if, in the field of criminal law, where fundamental rights scrutiny is all the more important, the application of fundamental rights would be more limited. And one could add that the Charter of Fundamental Rights is further evidence of the fact that the institutions (and the member states) perceived such state of affairs as *status quo*. Thus, the Charter binds the member states whenever they implement Union law, and there is no indication in the Charter that the direct effect of the provision implemented is relevant to its application.

[33] The situation is much more complex in relation to directives providing for minimum harmonization; for an excellent critical analysis *see* F. De Cecco, 'Room to move? Minimum harmonization and fundamental rights', 43 *CMLRev.* (2003) p. 9.

Secondly, member states are in any event bound, in the exercise of their discretion, and as a matter of national law, by their constitutional fundamental rights,[34] as well as by the European Convention on Human Rights. The direct effect of Union fundamental rights simply would guarantee effective (and in some instances more speedy) protection.[35] Furthermore, it should be noted that in such cases, there is no space for a conflict over the possible level of fundamental rights protection: when a member state is exercising discretion within the scope of Union law, and to the extent to which that is compatible with Union law, it is the highest standard of fundamental rights that applies. In other words, if the general principles provide for a higher standard of protection than constitutional law, then the member state is under a duty to respect the higher Union law standard. If, on the other hand, it is constitutional law that provides a higher standard of protection, and the member state has discretion, then, as a matter of national law, it will be under an obligation to exercise that discretion consistently with fundamental rights as protected in its own system.[36] The problem of possible differing standards, a real problem when considering the validity of Union (including Community) law, therefore does not arise in these cases.

The possibility of invoking Francovich damages

The applicability of the principle of loyal co-operation to framework decisions raises the important question of the possibility of extending *Francovich* damages to sufficiently serious breaches of Union law, and in particular, to cases in which individuals suffer damages from the non-implementation of framework decisions. After all, Francovich damages might well enhance both the effectiveness and the uniformity of Union law by imposing a financial incentive upon the member states to comply with the obligations undertaken at Union level. However, it should be queried whether the extension of the principle of State liability to the third pillar is constitutionally consistent as well as practically workable or useful.

[34] E.g., *see* the German Constitutional Court *Bundesverfassungsgericht*, 18/7/05, 2 BvR 2236/04; as reported on <www.bundesverfassungsgericht.de/bverfg_cgi/pressemitteilungen/frames/bvg05-064e.html> on the incompatibility with the German Constitution of the law implementing the Framework decision on the European Arrest Warrant.

[35] For a more extensive analysis of this issue, *see* Spaventa, *supra* n. 25. Of course there is an open issue as to whether the principle of supremacy applies to the Union as well as to the Community; *see* D. Curtin and I. Dekker, 'The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-in-Diversity', in P. Beaumont et al. (eds.), *Convergence and Divergence in European Public Law* (Oxford, Hart Publishing 2001) esp. at p. 68-69.

[36] Cf. the German Constitutional Court *Bundesverfassungsgericht*, 18/7/05, 2 BvR 2236/04; as reported on <www.bundesverfassungsgericht.de/bverfg_cgi/pressemitteilungen/frames/bvg05-064e.html> on the incompatibility with the German Constitution of the law implementing the Framework decision on the European Arrest Warrant.

In order to establish the principle of State liability for breaches of Community law, the Court in *Francovich* relied on the following considerations.[37] First, the E(E)C Treaty had created its own legal system, integrated in the legal systems of the member states and which national courts are bound to apply. Such a system also is intended to grant rights to individuals, not only when such rights are expressly granted by the Treaty but also by virtue of 'obligations which the Treaty imposes in a clearly defined manner both on individuals and on the member states and the Community institutions.' Secondly, national courts must ensure the full effectiveness of Community law, and must protect the rights conferred on individuals. Thirdly, the effectiveness of Community law would be weakened if individuals were not able to obtain redress when their rights are infringed by a member state's breach of Community law. This is particularly the case when the full effectiveness of Community law is conditional upon prior action by the member state, and therefore individuals cannot enforce their rights in absence of such action. Finally, in order to reinforce its reasoning, the Court relied on Article 10 EC, i.e., on the principle of loyal co-operation.

Now, it seems that, following the *Pupino* ruling, the latter three considerations can be extended to breaches of Union law, at least those resulting from non-compliance with a framework decision/decision. Thus, the principle of loyal co-operation applies also to the third pillar; national courts clearly must ensure the effectiveness of Union law, since otherwise they would not be bound by the duty of consistent interpretation;[38] and, in the third pillar, the possibility of relying on rights conferred by Union law is always conditional upon action of the member states since third pillar instruments cannot have direct effect. Thus, the Court's considerations based on the effectiveness of Community law, and on the national courts' duties arising from loyal co-operation can be easily extended to framework decisions. However, this is not in itself sufficient. In order to assess whether the principle of State liability can be extended beyond the first pillar, it is necessary to investigate whether the constitutional specificity of the third pillar lends itself to such a step. In particular, the Court's first consideration in *Francovich* related to the very nature of the Community legal system. The Court relied on the fact that such a system is integrated into the national legal systems and that it is also intended to grant rights to individuals. At first sight then, one could doubt whether such a reasoning could be extended to Title VI EU, and indeed, before the ruling in *Pupino*, the answer would have been negative for a number of reasons. First of all, it is difficult to maintain that Title VI is intended to grant rights to individu-

[37] ECJ 19 Nov. 1991, Case C-6/90, *Francovich and Bonifaci* v. *Italy*.

[38] The Court in *Pupino* uses a slightly different and self-referential reasoning by focusing on the fact that if individuals were not to be able to rely on the duty of consistent interpretation then the Court jurisdiction in the preliminary ruling procedure would be deprived of most of its useful effect.

als. This conclusion is supported not only by the very exclusion of direct effect, but also by the non-mandatory nature of the Court's jurisdiction; by the exclusion of the possibility to bring an action for damages for non-contractual liability of the Union; and by the exclusion of the possibility to bring a direct action for judicial review. Secondly, the very nature of the third pillar is different from the Community pillar. The former lacks that level of integration into the national legal systems that characterises the latter.

This said, following the ruling in *Pupino*, it seems that the distance between the pillars, at least between the first and third, has been considerably reduced. *Pupino* can be seen as a bridge allowing for the transferral of some first pillar doctrines into the third pillar. In particular, whilst Title VI EU does not in itself contain right-granting provisions, it is clear that framework decisions can intend to confer individual rights (such was the case in *Pupino*). And it is also clear that even if reduced, the constitutional arrangement of Title VI presupposes a certain level of integration with the national legal systems. Thus, framework decisions are directly binding upon member states without any need for ratification by national parliaments. And, as we have seen in the course of this article, framework decisions are capable of producing some legal effects independently from any implementation in national law. Recognising the liability of member states for failure to implement framework decisions, or failure to do so correctly, seems consistent with the constitutional system delineated by the Court in *Pupino*. It would ensure the effectiveness of Union law; it would help to guarantee rights of individuals and it would be consistent with the principle of loyal co-operation. Furthermore, given the lack of centralised enforcement of Union law obligations, the possibility of providing for at least some private enforcement would enhance uniformity of Union law.

However, the more challenging problem is not whether *Francovich* damages should be available, in principle, for sufficiently serious breaches of Union law. Rather, the difficult issue relates to the assessment of the conditions to impose such a liability. As is well-known, in order to establish member state liability for a breach of Community law, three conditions must be met: the Community legislation must intend to confer rights which are ascertainable; the breach must be sufficiently serious; and there must be a causal link between the alleged damage and the breach of Community law. In relation to framework decisions, all three conditions might give rise to significant interpretative problems, especially given the need to protect the smooth functioning of the criminal justice system, as well as due process. For instance, the definition of the 'intention to grant rights' must be interpreted restrictively so as to exclude any notion of a 'right' to have a conduct identified as a crime or an activity to be punished in a given way. Thus, whilst the framework decision on the victims of crime at issue in *Pupino* might be

interpreted as intending to confer ascertainable rights, the framework decision on terrorism,[39] which defines the constituent elements of a 'crime', should never be interpreted as a right-granting instrument. However, in between the two extremes, there might be instances in which it is difficult to identify whether the provision does or does not grant rights.

Even more importantly, the assessment of what constitutes a sufficiently serious breach in such a sensitive context might be delicate. In this respect, consider the Court's ruling in *Köbler*.[40] There, the *Verwaltungsgerichtshof*, the Austrian Administrative court of last resort, made a reference in relation to litigation concerning whether the length of service in non-Austrian universities should be taken into account for length of service related salary increments in Austrian universities. Whilst the case was pending in front of the ECJ, the latter Court delivered a ruling on a similar question, which had been referred by a German court.[41] As a result the ECJ registrar enquired of the Austrian court as to whether the ruling in the German case was sufficient or whether it would like to maintain the request for a preliminary ruling. The Austrian court withdrew the reference; however, it then distinguished the Austrian legislation and decided that the ruling of the ECJ was not applicable to the facts of the proceedings before it. Since the court was one of last resort, Mr. Köbler brought an action for *Francovich* damages against Austria. The ECJ accepted that, as a matter of principle, *Francovich* damages are available against a sufficiently serious breach of Community law perpetrated by a national court of last resort. However, it then found that in the case at issue the breach of Community law had not been sufficiently serious to give rise to damages. However, it could be argued that according to the Court's own case-law, the breach should have been deemed sufficiently serious: the Austrian court, being the court of last resort, had no discretion under Article 234 EC: if following the ruling in *Schöning,* it considered the matter *acte éclairé*, it should have applied the ruling given by the Court; or else, if it was in any doubt as to whether the ruling applied, then it should have not withdrawn its reference. Yet, the Court refrained from declaring that the national court had committed a breach of Community law, which was sufficiently serious to trigger *Francovich* damages. In that context, the Court adopted a pragmatic approach that respected the sensitivities of the national judiciaries and of the member states.

In the area of criminal law, the balance is even more delicate and the definition of what constitutes a sufficiently serious breach is more difficult. Taking again

[39] Council Framework Decision 2002/475/JHA on combating terrorism, *OJ* [2002] L 164/3.

[40] ECJ 30 Sept. 2003, Case C-224/01 *Köbler* v. *Austria*.

[41] ECJ 15 Jan. 1998, Case C-15/96 *Kalliope Schöning-Kougebetopoulou Freie und Hansestadt Hamburg.*

Pupino as an example: would the failure of the Italian legislature to provide for a special procedure for young victims of crime of a non-sexual nature be a sufficiently serious breach of Union law?

Finally, the establishment of a link of causation might also prove difficult. Again, in the case of *Pupino*: it would not be easy to determine whether the distress encountered by the children is a result of the events, of the criminal proceedings or rather of the lack of protection in the gathering of the evidence. Even though such problems might also arise in relation to first pillar *Francovich* cases, it seems that the very subject-matter of the third pillar renders the establishment of State liability both more difficult, and politically and practically more sensitive.

Pupino in its broader context: the effect of Union law

So far, we have focused on the effect of the *Pupino* ruling in relation to framework decisions. What has been said about those instruments is most likely to apply also in relation to decisions, when such decisions concern individuals. It is now necessary to investigate whether the *Pupino* ruling is of more general application. In particular, the question arises as to whether the duty of loyal co-operation extends to those instruments over which the Court has no jurisdiction, i.e., third pillar common positions and second pillar instruments.

As mentioned before, in order to establish the existence of the duty of loyal co-operation in relation to framework decisions, the Court resorted to a (thin) textual argument as well as a more persuasive teleological one: thus it found that Article 1 of the Treaty on European Union states that this Treaty marks a new stage in the process of creating an ever closer Union among the peoples of Europe, and that it would be difficult for the Union to carry out its tasks effectively if the principle of loyal co-operation were not binding in relation to police and judicial co-operation in criminal matters. The Court then expressly referred only to Title VI of the Treaty suggesting that the application of such a principle indeed is confined to the third pillar, although it might extend to common positions. However, it could be argued that the reasoning of the Court leads to a finding of applicability of the principle of loyal co-operation also in relation to action adopted in the second pillar and, where relevant, to the possibility of invoking the duty of consistent interpretation in front of the national courts in relation to such matters.

The Union legal system and the constitutional principles informing such a system must be the same regardless of the competence relied upon. The differentiation between Common and Foreign Security Policy, Co-operation in Criminal matters and Community law concerns more the subject-matter over which the Union is exercising competence, than its constitutional principles. Thus, decisions taken in the second pillar are mainly executive decisions: they are not reviewable by the Court of Justice, but in most systems, they would not be reviewable

by the national courts either. The same goes for common positions in the context of the third pillar: those are, or should be, policy instruments which define the 'approach' of the Union. In relation to those acts, it is not that the principle of loyal co-operation does not (or should not) apply. It is that its application is played out within the Council itself, and cannot be reviewed. Similarly, in many cases, the principle of consistent interpretation would not be relevant since most of those acts are not intended to affect the legal situation of individuals and national courts might well not have jurisdiction. However, the fact that in many instances these principles are not legally enforceable does not mean that the Union system should not be perceived as unitary.

In this respect, consider the existence of the passerelle clause in Article 301 and 60 EC. Those Articles provide for Community competence to enact measures in relation to economic sanctions pursuant to a decision taken in the field of Common Foreign and Security Policy. And, as we have seen above, the Union also can enter into international agreements in the field of co-operation in criminal matters by using common foreign and security competence together with the passarelle clause provided in Article 38 EU. The very existence of bridges between second and first pillar, and between third and second pillar, suggest that the Union system should be interpreted as unitary.[42]

Furthermore, in some instances, the recognition of the unitary nature of the Union system and of the binding nature of its constitutional principles is vital not only to safeguard individual rights but also to ensure the legitimacy of Union action by imposing a reviewable fundamental rights limit on Union law. This is especially the case when the European Union acts by means of non-reviewable instruments and its action directly or indirectly affects individual rights. In this respect, it is useful to recall Advocate-General Mengozzi's Opinion in the case of *SEGI*.[43] That case concerned a Common Position (an instrument not reviewable in the Community courts), which listed individuals and organisations that the European Union had identified as being terrorists. In examining the possible existence of a gap in judicial protection in relation to one of the organisations which had been placed on such a list, Advocate-General Mengozzi argued in favour of a full assertion of jurisdiction by the national courts and in favour of the national courts' powers to provide remedies as well as to review the legality of the Common Position. The Advocate-General found that the fact that the European courts' jurisdiction was excluded had no bearing on the jurisdiction of the national courts

[42] This is even more so the case after the Court of First Instance, 21 Sept. 2005, Case T-306/01, *Yusuf et al.* v. *Council and Commission*, and Case T-315/01 *Kadi* v. *Council and Commission*, has accepted the possibility to complement the passerelle clause with a 308 EC legal basis to provide for Community competence in relation to sanctions against individuals.

[43] Opinion 26 Oct. 2006, Joined Cases C-354/04 P and C-355/04 P, *Gestoras Pro Amnistía et al.* and *Segi et al.*

and that indeed the principle of loyal co-operation required national courts to effectively protect fundamental rights as general principles of Union law. Whilst it is too early to know whether the Court will express its views on the matter regardless of the fact that it has no jurisdiction to hear the case, the arguments put forward by the Advocate-General are compelling. If the Union system were to be perceived as fragmented, then the impact of the general principles, of fundamental rights, and of judicial protection would be dependent on a purely executive choice as to the instrument or the competence to be used. It is left to the reader to determine whether that would be consistent with a European Union based on the rule of law.

Conclusions

The *Pupino* ruling has important constitutional consequences. By transposing a Community law doctrine to the field of co-operation in criminal matters, it acts as a bridge between the pillars. The ruling was not unanimously well received: concerns about loss of sovereignty in the criminal sphere and judicial law-making might have all contributed to the criticism. This said, it should be noted that the ruling in *Pupino* might serve as a much-needed judicial guarantee in a field where significant legislative action is taking place without any significant democratic accountability. The problem, if there is one, does not stem from the transposition of a Community law doctrine to the field of criminal co-operation; rather, it stems from the institutional framework in the third pillar that allows action in the criminal sphere to be taken at the executive level and far away from the public eye. The Constitutional Treaty would have solved this problem by eliminating the pillar structure and subjecting action in the criminal sphere to the same judicial and democratic guarantees that characterise the first pillar. In this sense, it is possible that the Court in *Pupino* simply anticipated what it had reason to believe was going to happen in any case, once the Constitutional Treaty entered into force. It is also possible that the Court acted out of concern that the Treaty might not enter into force. But one also should consider that from a hermeneutic viewpoint, the Court's reasoning is sound, and indeed the national court took for granted that the principle of consistent interpretation would apply also in relation to framework decisions. However, as Pandora's box, the ruling contains much more than it might appear at first sight. In particular, it is possible that a range of constitutional doctrines first elaborated in the context of the Community legal order might be applicable in the context of the third pillar. This is not a bad thing if such constitutional doctrines are instrumental to the protection of individual rights. The Court might have released some evils from its box, but it surely released some hope as well.